## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion Below | 2 |
| Question Presented | 2 |
| Statutory Provision Involved | 2 |
| Statement of the Case | 3 |
| A Writ of Certiorari Should Be Denied | 3 |
| Conclusion | 11 |
| Appendix | 1a |


## AUTHORITIES

Cases:


| | |
|---|---|
| Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) | 10 |
| Cataphote Corporation v. De Soto Chemical Coatings, Inc., 356 F. 2d 24, 26 (9th Cir. 1966), cert. denied, 385 U.S. 832 (1966) | 11 |
| Friedman v. Fordyce Concrete, Inc., 362 F. 2d 386 (8th Cir. 1966) | 10 |
| Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963) | 10 |
| Las Vegas Merchant Plumbers Ass'n v. United States, 210 F. 2d 732 (9th Cir. 1954), cert. denied, 348 U. S. 817 (1954) | 5, 9 |
| Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923) | 2 |
| Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923) | 2 |
| Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 73 (1955) | 2, 11 |
| Todd v. United States, 362 F. 2d 531 (10th Cir. 1966), cert. denied, 385 U.S. 994 (1966) | 10-11 |

Page

United States v. Chrysler Corporation, 180 F. 2d 557 (9th Cir. 1950) ..... 5, 8

United States v. Frankfort Distilleries, 324 U.S. 293 (1945) ..... 5, 7, 9

United States v. South Florida Asphalt Co., 329 F. 2d 860 (5th Cir. 1964), cert. denied 379 U.S. 880 (1964) ..... 5, 6, 8

United States v. Spector, 343 U.S. 169, 172 (1952) 4

Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943) ..... 5, 6, 9, 10

Statutes:

15 U.S.C. §1, The Sherman Act ..... 2, 3, 1a

15 U.S.C. §§ 1-33 ..... 5, 6, 7

29 U.S.C. §§ 201-219, Fair Labor Standards Act ..... 5, 6

Miscellaneous:

Rule 52(a), Fed. R. Civ. P. ..... 10

28 U.S.C.A. (1967 Supp.) S. Ct. R. 19 ..... 2, 11

Rule 19, 1954 Revised Rules, U.S. Court of Appeals for the Tenth Circuit ..... 4

Hughes, Address to American Law Institute (May 10, 1934), 11 A.L.I. Proceedings 313 (1934) ..... 2

Vinson, Address to American Bar Association (Sept. 7, 1949), 69 S. Ct. v, vi (1949) ..... 2

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

KENNETH A. BURKE, dba RANCH ACRES LIQUORS; I. A. CHANDLER, JR., dba CHANDLER RETAIL LIQUORS; WILLIAM E. MANLEY dba TWENTY-FIRST & HARVARD LIQUOR STORE; JESSE B. RENICK dba PENNINGTON HILLS LIQUOR STORE; SARAH SIMPSON KEEL dba WAREHOUSE LIQUOR STORE; and C. J. WRIGHT, JR., dba WRIGHT'S BEVERAGE STORE,

*Petitioners,*

vs.

CLARENCE FORD and FRANK J. KUNC, dba ALL BRANDS SALES COMPANY; GEORGE S. FARHA and JOHNNY MONSOUR, dba CAPITOL BEVERAGE COMPANY; ZEAK NAIFEH and BOB NAIFEH, dba CENTRAL LIQUOR COMPANY; W. T. MILAM, dba FAMOUS BRANDS WHOLESALE LIQUOR CO.; GLEASON ROMANS, dba GLEASON ROMANS COMPANY; JOE R. JARBOE, dba JARBOE SALES COMPANY; KENNETH AMBROSE, III, dba LEADER LIQUOR COMPANY; TOM CONWELL, dba MIDWEST DISTRIBUTORS; KENNETH COOKSON, SR., dba PIONEER WHOLESALE LIQUOR DISTRIBUTORS; FARRIS P. SAFFA and GEORGE P. SAFFA, dba SAFFA BEVERAGE COMPANY; L. D. BRITTAIN, dba SOUTHWEST DISTRIBUTING COMPANY; ROSCOE THOMPSON, JERRY THOMPSON and PAT THOMPSON, dba THOMPSON'S DISTRIBUTING COMPANY; CARL AVERY, dba TOPS LIQUOR DISTRIBUTORS; H. D. GRIMSHAW, dba UNITED BEVERAGE CO., OKLAHOMA CITY; W. R. GRIMSHAW, JR., dba UNITED BEVERAGE COMPANY; and K. E. NAIFEH, dba WESTERN DISTRIBUTING COMPANY,

*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO PETITIONERS' SUPPLEMENTAL BRIEF

---

### OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported officially at 377 F. 2d 901 (10th Cir. 1967).[1]

### QUESTION PRESENTED

Petitioners state in their Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit that the question presented is:

> "Whether or not the *jurisdictional element of interstate commerce* within the meaning of Section 1 of the Sherman Act, 15 U.S.C. 1, *was proved* by petitioners." (Pet. p. 2.) (Italics supplied.)

We agree that the Petition seeks review only of a factual question, and respectfully submit that the Petition should therefore be denied.[2]

### STATUTORY PROVISION INVOLVED

The Sherman Act, 15 U.S.C. § 1, is set out in the Appendix, *infra*, p. 1 a.

---

1. Findings of fact and conclusions of law of the trial court are reported officially at 246 F.Supp. 403 (N.D. Okla. 1965).
2. 28 U.S.C.A. (1967 Supp.) S.Ct. R.19; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); Hughes, *Address to American Law Institute* (May 10, 1934), 11 A.L.I. Proceedings 313 (1934); Vinson, *Address to American Bar Association* (Sept. 7, 1949), 69 S.Ct. v, vi (1949).

## STATEMENT OF THE CASE

The trial court, as a trier of fact without a jury, found that petitioners (plaintiffs) had failed to prove the existence of any conspiracy and had further failed to prove that the alleged conspiracy "affected" interstate commerce or that the alcoholic beverages (the subject of the alleged conspiracy) remained in the "continuous flow" of interstate commerce.[3]

Though the trial court's findings could have been affirmed upon any one of the foregoing grounds, the Court of Appeals,[4] in an opinion by Chief Judge Murrah, after noting the trial court's findings,[5] found that petitioners (plaintiffs) had utterly failed in their proof of the interstate commerce jurisdictional requirement in actions under the Sherman Act, 15 U.S.C. § 1,[6] and, accordingly, found consideration of the correctness of other findings of the trial court to be unnecessary.[7]

## A WRIT OF CERTIORARI SHOULD BE DENIED

Essentially, petitioners assert that the alcoholic beverages, which had their origin out of state, continued in the "flow" of interstate commerce through the respondent

3. The trial court also found that the acts complained of had ceased prior to trial; that there were no acts or threatened acts to enjoin; and that the issue of an injunction was moot. (R. 67)
4. 377 F.2d 901 (10th Cir. 1967).
5. "Trial was to the court. . . . [H]e also found that the evidence fell short of proving an unlawful conspiracy or understanding to divide those brands and territories; that the Sherman Act prerequisite involvement with interstate commerce was also lacking; that since in any event market division had admittedly ceased by the time of trial there were no acts or threatened acts to enjoin and the matter of an injunction was, therefore, moot." (377 F.2d at 902-3 (10th Cir. 1967); App. 3.)
6. "We affirm on the sole ground that the proof was entirely insufficient to show that the activities complained of were in or adversely affected interstate commerce." (377 F.2d at 903 (10th Cir. 1967); App. 3.)
7. "In this posture of the case we do not express any view on the other issues raised by the retailers [petitioners] concerning the existence of a conspiracy to divide markets and the mootness of equitable relief." (377 F.2d at 908 (10th Cir. 1967).)

wholesale liquor dealers to the ultimate consumers and that the trial court erred in finding that petitioners had failed to establish that such goods remained in interstate commerce.[8]

In an attempt to establish such contention, petitioners, by supplemental brief in this Court, for the first time set forth reference to the record, a statement of some of the evidence which petitioners assert supports their contentions, and, without having made any offer of proof in the trial court, without having otherwise perfected an appeal thereon, and without having in any manner raised the issue in the Court of Appeals, assert that the trial court committed error in limiting petitioners in their proof and in excluding testimony as to the purported "continuous flow" of the alcoholic beverages.[9]

It is fundamental that alleged errors of the trial court which are not raised by an appellant in the Court of Appeals are waived, and that this Court will not review issues which are neither raised in the trial court nor in the Court of Appeals. *United States* v. *Spector*, 343 U.S. 169, 172 (1952).

Despite petitioners' assertion that the decision of the Court of Appeals is in conflict with decisions of this

8. Supp. Br. p. 5.
9. Supp. Br. pp. 4, 5-10.
It is interesting to note, in this connection, that even though petitioners' appeal from the trial court to the Court of Appeals was predicated upon alleged errors of the trial court in its findings of fact, and despite the rule of the Court of Appeals (Rule 19, 1954 Revised Rules, U.S. Court of Appeals for the Tenth Circuit, applicable to this appeal) that appellants' (petitioners') brief set forth "A concise abstract or statement of the case, with page references to the record, presenting succinctly the questions involved in the manner in which they are raised.", petitioners failed in their brief and in their supplemental brief after oral argument in the Court of Appeals to set forth any evidence or statement of the case supporting

Court and other Courts of Appeals, neither the appeal by petitioners from the trial court to the Court of Appeals nor the Petition herein raises any issue other than the correctness of the trial court's findings of fact.

Petitioners seek a writ of certiorari for the reason that the judgment as entered by the district court and as affirmed is contrary to the rule of law as set forth in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943) (Pet. p. 3) and *United States* v. *Frankfort Distilleries*, 324 U. S. 293 (1945) (Pet. p. 3), as well as being contrary to various cases in other circuit courts, *e. g.*, *United States* v. *Chrysler Corporation*, 180 F. 2d 557 (9th Cir. 1950) (Pet. p. 3); *United States* v. *South Florida Asphalt Co.*, 329 F. 2d 860 (5th Cir. 1964), *cert. denied*, 379 U. S. 880 (1964) (Pet. p. 3), and *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F. 2d 732 (9th Cir. 1954), *cert. denied*, 348 U. S. 817 (1954) (Pet. p. 3).

In the *Walling* case, *supra*, which was a Fair Labor Standards Case, 29 U.S.C. §§ 201-219, rather than one involving the Sherman Act, 15 U.S.C. §§ 1-33, the Administrator divided the goods ordered into three categories to demonstrate that the district court had improperly found that the Fair Labor Standards Act did not apply to the actions of the defendant in that case: first, those goods which were ordered from out of state to fill a particular order of a retail customer; second, those goods which were ordered under a contract or understanding by which the wholesaler had agreed to fill the needs of a particular retail customer within the state; and third, those goods which were ordered to fill the anticipated needs of a gen-

ticular customer although no contract or understanding to do so existed. This Court held that the goods purchased which fell within the initial two categories discussed above were obviously within the flow of interstate commerce and thus the Fair Labor Standards Act, *supra*, would be applicable. Insofar as the third category is concerned, the Administrator contended that where a wholesaler orders merchandise from out of state for a fairly stable group of customers whose orders to the wholesaler are recurrent, the business with these customers is in the continuous flow of interstate commerce within the meaning of the Act. This Court refused to adopt that interpretation and held that under the facts of the *Walling* case, *supra*, such goods were not in interstate commerce under the Act. Since *no* evidence was offered by petitioners in the instant case and no issue was presented to the Court of Appeals, as to the ordering methods of respondents, regardless of any categories it can readily be seen that the instant case could not be inconsistent with the *Walling* case, *supra*.[10]

10. The respondent in the *Walling* case, *supra*, also argued that once the goods entered the warehouse of the respondent the flow of interstate commerce was terminated. This was not the argument of the respondents in the instant case, and, of course, the factual circumstances are considerably different. In the *Walling* case, *supra*, after the case had gone to trial in the district court, the respondent Jacksonville Paper Company attempted to take orders which came from out of state and previously had been delivered directly to retail customers and divert them through its warehouse where a mere temporary pause occurred before they were loaded upon trucks and transmitted immediately to the customer. In such an instance, Mr. Justice Douglas concluded that the temporary pause in the warehouse under the facts of that case was not sufficient to remove the goods from the flow of interstate commerce. This conclusion is of course not inconsistent with the opinion rendered by the Court of Appeals or the factual findings made by the district court below, because no evidence was introduced by petitioners to demonstrate that there was any temporary pause in the warehouses of the defendants. For that matter, no evidence was introduced to demonstrate any of the ordering or delivery methods or practices of the respondents.

Similarly, the petitioners are incorrect in stating that the decisions of the lower courts were inconsistent with the case of *United States* v. *Frankfort Distilleries*, 324 U. S. 293 (1945) (Pet. p. 3). First, the issue was not whether the Government in that case failed to prove sufficient facts to establish jurisdiction in the federal court and therefore the applicability of the Sherman Act, 15 U.S.C. §§ 1-33, *but was instead whether an indictment followed by a plea of nolo contendere was sufficient to establish the jurisdictional facts.* Motions to dismiss filed by the defendants in the district court were denied but such motions were granted by the Court of Appeals. The Supreme Court in the *Frankfort* case, *supra*, directed itself to only two major issues. The Court held that the conspiracy as alleged extended beyond state lines. As a matter of fact, some of the defendants were out-of-state corporations, and in any event, the conspiracy operated to require out-of-state companies to enter into price fixing agreements with the local wholesale sellers of alcoholic beverages. Under these circumstances, the Court held that the indictment and plea of *nolo contendere* were sufficient to establish jurisdiction since obviously the effect of the alleged conspiracy extended beyond state lines and into interstate commerce. There were no such allegations in the Complaint in the instant case and no proof was presented at trial to demonstrate that the alleged conspiracy in the instant case either involved conspirators located out of state or had any effect whatsoever on interstate commerce.[11]

---

11. The Supreme Court in *Frankfort* also considered the effect of the Twenty-first Amendment to the Constitution of the United States and held that the Sherman Anti-Trust Act, *supra*, was not improperly applied because the Twenty-first Amendment did not remove from Congress the power to enforce such laws through its full use of the commerce clause of the Constitution. Neither the district court nor the Court of Appeals in the instant case rested its decision upon this ground. It can therefore be seen that these decisions of the lower courts were not inconsistent with the *Frankfort* case, *supra*.

The remaining three cases cited by petitioners involving other Courts of Appeal similarly are not inconsistent with the decision of the lower courts in the instant case. The case of *United States* v. *South Florida Asphalt Co., supra,* is inapposite because there was no determination on the merits of the case. Instead the district court granted the motion to dismiss the Government's indictment for failure to state a cause of action. The order of dismissal was appealed to the Court of Appeals for the Fifth Circuit and reversed. One minor issue was whether the asphalt, a portion of the goods upon which the alleged conspiracy impinged, came to rest in the vats, and thus interstate commerce ceased. Although it is true the court concluded that the indictment was sufficient and the Government should have an opportunity to present its evidence, the question of whether the asphalt came to rest was never finally determined. *Instead, the court decided that whether the goods had come to rest and whether interstate commerce had ceased was a factual question upon which proof must be presented.*

In the instant case, petitioners were given ample opportunity to prove that a continuous flow of alcoholic beverages in interstate commerce occurred, but both the district court and the Court of Appeals for the Tenth Circuit held that the petitioners (plaintiffs) had failed to do so.

Neither does the case of *United States* v. *Chrysler Corporation, supra,* indicate that the Courts of Appeals for the Ninth and Tenth Circuits disagree upon the proper interpretation of the Sherman Act or the evidence re-

quired to be presented in order to demonstrate a continuous flow of goods moving in interstate commerce. First, the issue was not whether the Government in that case was able *to prove* that there was a continuous flow of merchandise; the issue was whether the indictment was sufficient. In the instant case, no competent evidence was presented to the lower court to indicate any continuity of orders of merchandise from the out-of-state distillers to wholesalers and then to retailers. Petitioners apparently take the position that if the goods commence their journey out of state, this single fact proves a continuous flow in interstate commerce until ultimate consumption.[12]

Neither does the case of *Las Vegas Merchant Plumbers Ass'n* v. *United States, supra,* demonstrate a conflict in circuits. In that case, the Court of Appeals for the Ninth Circuit merely held that the *indictment* stated a sufficient cause of action and that the evidence introduced by the Government was sufficient to demonstrate that the goods upon which the alleged conspiracy impinged remained in interstate commerce.[13]

The foregoing demonstrates that the reasons for granting the writ as set forth by petitioners are improperly supported. The factual findings by the district court and the affirmance thereof by the Court of Appeals for the Tenth Circuit, rather than being inconsistent with the *Walling* and *Frankfort* decisions, were based upon such

12. This view has never been adopted by any federal court to respondents' knowledge and is wholly inconsistent with the remaining authorities cited by petitioners (Supp. Br. p. 5).

13. The evidence in that case demonstrated that merchandise was shipped from out of state to wholesale contractors, retailers and even directly to the ultimate consumer. No such evidence was introduced in the instant case.

cases. Furthermore, no Court of Appeals for any other circuit has held to the contrary.

Neither the district court, which sat as the trier of fact, nor the Court of Appeals made any incorrect findings of fact, and the decision of the Court of Appeals that, *on the record in this case,* "the proof was entirely insufficient to show that the activities complained of were in or adversely affected interstate commerce.",[14] in no measure places "undue restrictions upon the Sherman Act never contemplated by Congress or the United States Supreme Court in its *Walling* decision.",[15] as petitioners have so blatantly asserted.

*Petitioners do not here assert that there was not substantial evidence to support the trial court's findings, but instead merely assert that there was some evidence to support petitioners' contentions.*

This, of course, is not the test on appeal from a trial in which the trial court was the trier of fact. Under Rule 52(a), Fed. R. Civ. P., findings of fact of the trial court may not be set aside unless "clearly erroneous". If the findings of fact are supported by substantial evidence, and are not "clearly erroneous", they are binding on the Courts of Appeals and upon this Court. *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206 (1963); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Friedman* v. *Fordyce Concrete, Inc.*, 362 F. 2d 386 (8th Cir. 1966); *Todd* v. *United States*, 362 F. 2d 531 (10th Cir. 1966), *cert. denied,*

14. 377 F.2d at 903 (10th Cir. 1967); App. 3.
15. Supp. Br. p. 11, referring to *Walling v. Jacksonville Paper Company*, 317 U.S. 564 (1943).

385 U. S. 994 (1966); *Cataphote Corporation v. De Soto Chemical Coatings, Inc.*, 356 F. 2d 24, 26 (9th Cir. 1966), *cert. denied*, 385 U. S. 832 (1966).[16]

Certiorari is not a device for a second review of the record, of the evidence presented at the trial, of the findings of fact of the trial court, or of the decision of a Court of Appeals which, after review of the record to determine if there is substantial evidence to support the correctness of the trial court's factual findings, merely affirms the judgment of the trial court predicated thereon. Absent "special and important reasons therefor", certiorari will not be granted by this Court. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70, 73 (1955); 28 U.S.C.A. (1967 Supp.) S. Ct. R. 19.

## CONCLUSION

No "special and important reasons" for granting certiorari to review the trial court's findings of fact are shown herein by petitioners. The trial court affirmatively found that petitioners had failed to prove any conspiracy; had failed to prove that the alcoholic beverages were in a

16. "Appellant, though reluctant to characterize the issue involved as one of fact, does nevertheless ground its argument on a purported demonstration of the 'clearly erroneous' nature of the district court's findings. In so doing, however, appellant disregards the severe limitations imposed on an appellate court in reviewing findings of fact. It is not our function to reevaluate the evidence presented below. We cannot substitute our judgment for the first-hand evaluation made by the trier of fact. Pursuant to Rule 52(a) . . . our obligation is to determine if the findings below were 'clearly erroneous.' This statutorily imposed standard does not vest us with power to reweigh the evidence presented at trial in an attempt to assess which items should and which should not have been accorded credibility. Our task, rather, is to determine if there exists evidence of substance to support the findings of fact of the trial court. Thus, it does not aid appellant's position on review to merely extract that evidence presented which supports its position; rather it must additionally demonstrate that no substantial evidence was presented which supports the district court findings in favor of appellee." (356 F.2d at 26 (9th Cir. 1966).)

continuous flow of interstate commerce; and had failed to prove that such alcoholic beverages affected interstate commerce. After careful review of the record, and concluding that there was sufficient evidence to support such findings of fact, the Court of Appeals affirmed.

Under such circumstances, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

Irvine E. Ungerman
William Leiter
Sixth Floor Wright Building
Tulsa, Oklahoma 74103

James L. Kincaid
510 Oklahoma Natural Building
Tulsa, Oklahoma 74119

David C. Johnston, Jr.
945 Commerce Exchange Building
Oklahoma City, Oklahoma 73102
*Attorneys for Respondents.*

Of Counsel:

Ungerman, Grabel, Ungerman & Leiter
Sixth Floor Wright Building
Tulsa, Oklahoma 74103

Huffman, Arrington, Scheurich & Kincaid
510 Oklahoma Natural Building
Tulsa, Oklahoma 74119

November, 1967

# APPENDIX

15 U.S.C. § 1, provides as follows:

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."